No. 70 Orig.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ARIZONA
Plaintiff,

v.

NEW MEXICO
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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CONSTITUTIONAL PROVISIONS

United States Constitution,
Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

United States Constitution,
Article IV, Section 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States Constitution,
Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution,
Article I, Section 8:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ARIZONA
Plaintiff,

v.

NEW MEXICO
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Arizona, by its Attorney General, asks leave of this Court to file its Complaint, submitted herewith, against the State of New Mexico.

BRUCE E. BABBITT
159 State Capitol
Phoenix, Arizona 85007
Arizona Attorney General

IN THE

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OCTOBER TERM, 1975

ARIZONA
Plaintiff,
v.
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Defendant.

COMPLAINT

The State of Arizona alleges the following causes of action against the State of New Mexico.

FIRST CAUSE OF ACTION

I.

The original and exclusive jurisdiction of this Court is invoked under the authority of Article III, Section 2, Paragraphs 1 and 2 of the Constitution of the United States and 28 U.S.C. Section 1251(a)(1) (1966).

II.

Plaintiff State of Arizona and defendant State of New Mexico are sovereign states of the United States.

III.

Plaintiff herein has no plain, speedy, or adequate remedy at law and has no remedy whatsoever in any other court.

IV.

Plaintiff brings this First Cause of Action in its proprietary capacity and in that capacity will sustain substantial monetary damage as a result of the unconstitutional acts of defendant.

V.

Chaper 263 of New Mexico Laws of 1975, which became effective July 1, 1975, purports to impose a privilege tax on the generation of electrical energy within New Mexico. A copy of that Act (hereinafter referred to as the "Electrical Energy Tax" or the "Act") is attached hereto as Exhibit "A" and is incorporated herein as though set forth in detail.

Section 3.A of the Act provides:

For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

Section 9 of the Act provides:

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit.

Section 9.B of the Act thus provides for a credit against the New Mexico Gross Receipts Tax for the Electrical Energy Tax paid upon electricity generated in New Mexico and consumed within New Mexico. No credit against the New Mexico Gross Receipts Tax is available with respect to the Electrical Energy Tax imposed upon electricity generated in New Mexico but consumed outside New Mexico. The interrelationship of Section 3.A and Section 9 of the Act in practical operation and effect intentionally shifts the incidence of the Electrical Energy Tax from the generation of electrical energy to the interstate transmission of electrical energy outside New Mexico.

VI.

Three Arizona entities, Arizona Public Service Company, Tucson Gas & Electric Company, and Salt River Project, own as tenants in common interests in electrical generating facilities in New Mexico. Two of the three Arizona entities are investor-owned public service corporations; the third, Salt River Project, is a political subdivision of the plaintiff. Electrical energy is generated at such facilities in response to consumer demands in Arizona, and this energy is instantaneously transmitted in interstate commerce to Arizona consumers. The generation of electrical energy in response to consumer demands in Arizona is inseparable from its interstate transmission to Arizona and constitutes interstate commerce.

VII.

Plaintiff consumes and pays for large quantities of electrical energy generated in New Mexico. The Electrical Energy Tax applies to all such electrical energy and will be paid by plaintiff through charges for energy consumed by it. Therefore, the incidence and burden of the Electrical Energy Tax falls upon plaintiff.

VIII.

Many political subdivisions of plaintiff, including community college districts, counties, cities and school districts, consume and

pay for large quantities of electrical energy generated in New Mexico. The Electrical Energy Tax applies to all such electrical energy and will be paid by such political subdivisions through charges for energy consumed by them. Plaintiff, through appropriation and revenue sharing, makes state funds directly available to its political subdivisions for the purpose of assisting in defraying the costs of local government, including payment of charges for energy consumed by them. Therefore, the incidence and burden of the Electrical Energy Tax falls upon plaintiff.

IX.

The Electrical Energy Tax constitutes an unreasonable discrimination against and an unconstitutional burden on interstate commerce.

SECOND CAUSE OF ACTION

I.

Plaintiff realleges, as though set forth in full, Paragraphs I, II, III, V, VI and IX of the First Cause of Action.

II.

Plaintiff brings this Second Cause of Action in its *parens patriae* or quasi-sovereign capacity.

III.

The vast majority of the citizens of Arizona consume and pay for electrical energy generated in New Mexico. The Electrical Energy Tax applies to all such electrical energy and will be paid by Arizona consumers through charges for energy consumed by them. Therefore, the incidence and burden of the Electrical Energy Tax falls upon Arizona citizens.

IV.

The Act discriminates, and was intended to discriminate, against the citizens of Arizona, by placing upon them the substantial burdens of the Electrical Energy Tax, a burden not borne by the citizens of New Mexico by reason of the credit provisions of Section 9 of the Act.

V.

The Act denies to Arizona citizens due process of law in violation of the Fourteenth Amendment to the United States Constitution.

VI.

The Act denies to citizens of Arizona the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

VII.

The Act abridges the privileges and immunities of citizens of Arizona guaranteed to them by Article IV, Section 2 of the United States Constitution.

WHEREFORE, PLAINTIFF PRAYS THAT:

1. The Court declare that the Act constitutes an unconstitutional discrimination against and burden upon interstate commerce.

2. The Court declare that the Act denies to Arizona citizens due process of law in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court declare that the Act denies to citizens of Arizona equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

4. The Court declare that the Act abridges the privileges and immunities of citizens of Arizona guaranteed to them by Article IV, Section 2 of the United States Constitution.

5. The Court restrain and enjoin the State of New Mexico from assessing, levying or collecting the tax imposed by the Act.

6. The Court award to plaintiff and against defendant plaintiff's costs expended and incurred in this suit.

7. The Court grant plaintiff such other and further relief as the Court may deem justified.

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EXHIBIT "A"

CHAPTER 263

AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-4-28 AND 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1 NMSA 1953.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.—Sections 1 through 6 of this act may be cited as the "Electrical Energy Tax Act".

Section 2. DEFINITIONS.—As used in the Electrical Energy Tax Act:

A. "bureau" means the New Mexico bureau of revenue;

B. "generation" includes manufacture and production;

C. "electricity" includes electrical energy and electrical power;

D. "person" means any individual, estate, trust, receiver, cooperative association, electric cooperative, club, corporation, company, firm, partnership, joint venture, syndicate, association, irrigation district, electrical irrigation district and any utility owned or operated by a county or municipality, and also means to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality; and

E. "sale" means selling or transferring to any person for consumption, use or resale and includes barter and exchange.

Section 3. IMPOSITION OF TAX—RATE—DENOMINATION AS ELECTRICAL ENERGY TAX.—

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax".

Section 4. MEASUREMENT AND RECORDING OF KILOWATT HOURS OF ELECTRICITY.—Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state.

Section 5. REPORTS—REMITTANCES.—Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs.

Section 6. RELIEF FROM OTHER TAXES.—Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the state of New Mexico or its political subdivisions.

Section 7. Section 45-4-28 NMSA 1953 (being Laws 1939, Chapter 47, Section 28, as amended) is amended to read:

"45-4-28. TAXATION.—Cooperative and foreign corporations, transacting business in this state pursuant to the provisions of Sections 45-4-1 through 45-4-32 NMSA 1953 shall pay annually, on or before July 1, to the state corporation commis-

sion, a tax of ten dollars ($10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act, and the Electrical Energy Tax Act; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract."

Section 8. Section 72-12-24 NMSA 1953 (being Laws 1965, Chapter 248, Section 12, as amended) is amended to read:

"72-13-24. RECEIPTS—DISBURSEMENTS—DISTRIBUTION.—

A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money.

B. Money received or disbursed by the bureau shall be accounted for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act. All revenues collected pursuant to the provisions of Sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act, the Resources Excise Tax Act, the Liquor Excise Tax Act and the Electrical Energy Tax Act shall be credited to this suspense fund and are appropriated for the purpose of making disbursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund, one-half of the receipts attributable to the electrical energy tax shall be transferred to the "electrical energy fund", hereby created, and the remainder to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one percent of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are substantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions of Section 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use."

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. CREDIT—GROSS RECEIPTS TAX.—

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

Section 10. LEGISLATIVE INTENT.—It is the intent of the legislature that this entire 1975 act be considered not severable, and should any part hereof be declared unconstitutional, the entire act should be declared void.

Section 11. EFFECTIVE DATE.—The effective date of the provisions of this act is July 1, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ARIZONA
Plaintiff,

v.

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Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

I

THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OF THIS CONTROVERSY

Plaintiff's Motion for Leave to File Complaint seeks to challenge the constitutionality of the Electrical Energy Tax Act (the "Act") enacted by the State of New Mexico as Chapter 263, New Mexico Laws of 1975, which purports to impose a tax on the privilege of generating electricity in New Mexico. This case should not present any significant factual issues; the central constitutional issues are clearly posed by the Act itself.

This controversy between the State of Arizona and the State of New Mexico is within the original and exclusive jurisdiction of this Court under Article III, Section 2, Paragraphs 1 and 2 of the Constitution of the United States and 28 U.S.C. Section 1251(a)(1).

The State of Arizona, in its proprietary capacity, is a major consumer of electrical energy generated in New Mexico. The tax sought to be imposed by New Mexico applies to such electrical energy and will be paid for by the State of Arizona through charges for energy consumed by it. Injury, therefore, will be done the State of Arizona in its propietary capacity. *North Dakota v. Minnesota,* 263 U.S. 365 (1923). This interest is independent of the interests of its citizens. *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907). Further, potential injury to the educational institutions, as consumers, and as instrumentalities of the State of Arizona, is injury to the State itself. *Arkansas v. Texas,* 346 U.S. 368 (1953). Arizona has no forum other than this Court in which to assert its claim. *Illinois v. Milwaukee,* 406 U.S. 91 (1972).

The State of Arizona is also suing as *parens partriae* for and on behalf of its citizens who are consumers of electrical energy generated in New Mexico. The right of the State to bring such an action has been recognized by this Court. *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972); *Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439 (1945). This is indeed an appropriate case for the State of Arizona to sue as *parens patriae.* The actions of the State of New Mexico threaten the very health, welfare, and comfort of the citizens of Arizona who consume electrical energy generated in New Mexico. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). Thus, regardless of pecuniary interest, the State of Arizona has standing here to protect its citizens. *Kansas v. Colorado,* 206 U.S. 46 (1907).

STATEMENT OF THE CASE

The purpose of this litigation is to challenge the constitutionality of the Act, a copy of which is attached to Plaintiff's Complaint as Exhibit "A".

Section 3.A of the Act imposes a tax of four-tenths of a mill per net kilowatt hour of electricity generated within the State of New Mexico, ostensibly "for the privilege of generating electricity [in New Mexico] for the purpose of sale."

Section 9 of the Act grants complete relief from the tax however, for all electricity generated *and consumed in New Mexico.* The exemption is achieved by adding to the New Mexico gross receipts tax, (72-16A-16.1 NMSA 1953) a clause which exempts from the electrical generation tax (by means of a 100% credit against the gross receipts tax) "electricity generated inside this state and consumed in this state."

Other provisions of the Act establish the credit provision as the central and operational feature of the Act. Section 10 states that the Act is to be considered inseverable and "should any part hereof be declared unconstitutional, the entire Act should be declared void", thereby insuring that the citizens of New Mexico shall in no way bear any burden of the tax. The net operational effect of the Act is such that the entire burden of the tax is borne by citizens of states other than New Mexico.

The State of Arizona and its citizens are consumers of substantial amounts of electrical energy generated in New Mexico. Enormous amounts of electricity are generated at facilities located within New Mexico in response to demands for electricity in other states; such electricity is transmitted instantaneously to interstate markets over interstate transmission lines. The electrical systems of all entities owning generating facilities in New Mexico are wholly or substantially interconnected, and the amount of energy generated in New Mexico at any time is determined by the total demands of electricity on the interconnected system at that time.

QUESTIONS PRESENTED

New Mexico has enacted an Electrical Energy Tax Act which taxes all electrical energy produced in that state and consumed outside New Mexico and which exempts from the tax (by means of a tax credit) any similarly produced electrical energy consumed within New Mexico. The questions presented are:

I. Whether the tax is an unconstitutional discrimination against or burden upon interstate commerce.

II. Whether the tax imposes a discriminatory burden on nonresidents of New Mexico in violation of the Interstate Privileges and Immunities Clause or the Equal Protection Clause of the Fourteenth Amendment.

Argument

I. THE ACT IS AN UNCONSTITUTIONAL DISCRIMINATION AGAINST AND BURDEN UPON INTERSTATE COMMERCE.

A. *The Act discriminates against interstate commerce.*

This Court, in determining the constitutionality of a state tax affecting interstate commerce, is concerned with the practical application of the tax in question. Regardless of how a tax may be denominated, labeled, or measured, the ultimate question is whether the tax in fact discriminates against interstate commerce or in favor of similarly placed local or intrastate business. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963); *Alaska v. Arctic Maid,* 366 U.S. 199 (1961); *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 608 (1951). ("It is not a matter of labels.").

The Act purports to impose a privilege tax on the manufacture and production of electricity in New Mexico. Beneath the label, however, the Act in fact imposes a tax which falls exclusively on the interstate transmission of electrical energy for consumption

outside the State of New Mexico. Section 3.A of the Act, which purports to impose the tax generally on all electricity generated, is followed by Section 9, which grants 100% credit against the New Mexico gross receipts tax for the electrical generation tax paid upon any electricity which is ultimately consumed in New Mexico.

In result, there is no dollars and cents tax liability for electricity generated and consumed in New Mexico; the apparent liability created by Section 3 is washed out by the credit provision of Section 9 for in-state consumption. The result is a "paper" tax erased by a "paper" credit upon all electricity generated and consumed in New Mexico.

However, for electricity generated in New Mexico and consumed outside the state, the credit provision is inoperative and the tax thereby becomes a true dollar liability at the point the electricity leaves New Mexico for consumption elsewhere. What purports to be a tax on privilege of *generating* electricity in New Mexico is in fact an unconstitutional tax imposed solely on the privilege of *transmitting* electricity in interstate commerce. *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602 (1951).

Such complete discrimination, by artful separation of only that segment of the energy destined for out-of-state sale to bear the entire tax, is plainly unconstitutional. This Court has, in a variety of less egregious factual settings, held that states cannot single out interstate activities for special taxes that are not borne by similarly situated local activties. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963) (holding unconstitutional a Louisiana use tax that imposed different standards resulting in higher taxes on property manufactured out-of-state; *West Point Grocery Co. v. Opelika,* 354 U.S. 390 (1957) (invalidating municipal tax on wholesale grocers operating outside city on ground that effect was to discriminate against out-of-state wholesalers); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342

U.S. 389 (1952) (voiding as violative of the Commerce Clause a Mississippi tax of $50 per out-of-state laundry truck as compared to $8 per truck within Mississippi); *Nippert v. Richmond,* 327 U.S. 416 (1946) (invalidating license tax on solicitors because of strong likelihood of discrimination against interstate commerce in favor of local business). *Cf. Alaska v. Arctic Maid,* 366 U.S. 199 (1961) (upholding a freezer ship tax upon finding that the tax did not discriminate in favor of local Alaska industry).

B. *The Act places an unconstitutional burden upon interstate commerce.*

Apart from its discriminatory effect, the Act, by directly taxing the flow of electrical energy in interstate commerce, places an impermissible burden on the flow of interstate commerce. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), the Court considered whether the Commerce Clause was infringed by a Texas tax on the occupation of "gathering gas", measured by the volume of gas "taken", as applied to an interstate natural gas pipeline company taking gas for the purpose of immediate interstate transmission. While the tax applied equally to gas moving in interstate and intrastate commerce, the Court noted that the statute prohibited the shifting of the tax back to the producer (presumably with the same design as the credit provision in the present case), that the statute had an inseverability provision (analogous to the inseverability provision in the present case), and that, as in the present case, the incidence of the tax had been delayed beyond the step where production had ceased and transmission in interstate commerce had begun. Characterizing the statute as in reality a tax "on the exit of gas from the state", the Court noted that the gathering of the gas into transmission lines was so integrally tied to interstate commerce that if Texas could impose such a tax, the door would be opened for the recipient and intermediary states to levy

a tax directly on the volume of the gas in the pipeline as the gas crossed their boundaries. "The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.

The generation and transmission of electricity in the southwestern United States in the year 1975 is inseparably a part of interstate commerce, to an extent not even conceived a few decades earlier. Electrical generating facilities throughout the southwestern states are now linked in a vast interstate grid of transmission and distribution lines. (Appendix "A", a map of the principal transmission lines on January 1, 1975 prepared by the Western Systems Coordinating Council, illustrates this fact.)

Markets demanding electrical energy are supplied from all generators on the interstate system without regard to state boundaries. Dispatchers control generation facilities throughout the interstate system to utilize the most efficient generating facilities and to minimize costs per kilowatt hour. Their decisions are made in response to demands placed on the total interstate system by all consumers without regard to state boundaries. Electricity is not generated in hope that demand will clear the available commodity from the market; rather it is generated solely in response to market demand and fluctuates on the interstate system from minute to minute each day throughout the year.

The principle of *Michigan-Wisconsin,* protecting an interstate gas transmission system from customs tariffs and the potential multiple burdens of state taxation, is even more valid and more urgently required in the present context. In the midst of an international energy crisis, with all its implications for the American economy, individual states cannot be allowed to step in and disrupt the regional and national flow of electrical energy by levying taxes directly on the volume flow of such energy.

Plaintiff does not contend that truly local activities of entities producing power cannot be taxed. New Mexico can and does levy

an ad valorem property tax on the modern, complex generating faciilties that are linked to the interstate system. New Mexico can and does levy privilege license taxes on domestic and foreign corporations such as the utilities that engage in business in New Mexico.

However, if New Mexico's power to tax is extended to a direct levy on the volume of electricity which instantaneously becomes part of a high voltage, interconnected system serving the entire Southwest, the possibilities for multiple taxation and interference with a smoothly functioning interstate energy system are obvious and impermissible. Any tax measured by the amount of electricity flowing into the interstate system invites other states similarly to tax the volume of electricity crossing their borders or passing through transformers within their borders. The result would be an impermissible direct taxation of, and the imposition of multiple burdens on, the movement of electricity in the interstate system. *Evco v. Jones,* 409 U.S. 91 (1972) (distinguishing invalid New Mexico gross receipts tax upon out-of-state sales of finished product and permissible tax upon income derived from services performed within New Mexico).

Thus as the Court recognized in *Michigan-Wisconsin,* the direct taxation of the interstate transmission of energy measured by volume, in fact, provides a method of taxation that strikes directly at the flow of interstate commerce. The flow of energy in interstate commerce, prohibited from being so taxed, is far removed from the "localized alternative incidents" which the states have been permitted to tax. *Colonial Pipeline Co. v. Traigle,* 95 S.Ct. 1538, 1543 (1975); *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947) (tax upon a stevedoring business impermissible as direct interference of the loading of an interstate carrier); *Western Union Telegraph Co. v. Texas,* 105 U.S. 460 (1882) (tax on telegrams placed into interstate commerce an unconstitutional direct interference with interstate commerce).

The holding of *Utah Power & Light Co. v. Pfost,* 286 U.S. 165 (1932) does not compel a contrary result. First, as previously discussed, the tax here at issue is, in actual operation and intended effect, a tax on the interstate transmission of electrical energy, quite unlike the tax in *Utah Power.*

Second, the nature of the electrical utility industry has changed dramatically since *Utah Power* was decided in 1932. What was once an industry characterized by small companies operating almost entirely within their service area, with only occasional, isolated interstate activity, has become a nation-wide energy system. Indeed, the creation of this national electrical energy system has been fostered and made possible by Congressional assistance. The clearest expression of the need for and desirability of a national electrical network is set forth in the Federal Power Act, 16 U.S.C. Section 824(a)(1935).

> For the purpose of assuring an abundant supply of electrical energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the [Federal Power] Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest.

Interstate coordination of energy transmission and sale is a relatively recent phenomenon that advances the Congressional objective of economical and reliable sale of electrical energy to consumers. To produce energy which is as economical as possible, the producers of electricity have taken advantage of "economies of scale" by building enormous generating facilities unheard of in

1932.[1] These modern facilities produce lower cost electricity than would otherwise be available by being built close to the source of fuel and water, by requiring fewer transmission and related facilities, etc. These savings are made possible by the fact that technological advances in the past forty years now allow transmission of enormous quantities of electrical energy over long distances. However, to take advantage of economies of scale, plants of the requisite capacity must be jointly owned and interconnected with other generating facilities in order to meet the goal of reliability. The interconnecting system and joint-ownership of large facilities provides essential security against the risk of a utility being unable to supply its consumers with energy in the event of a single generating facility failure. It is in this context that the business of generating electricity has become totally interstate in nature and fact.

The New Mexico tax, if sustained, could seriously distort this essential pattern of interstate electrical energy development. The scientific and engineering realities of the electric industry. which were used as the basic test in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945) should lead this Court to conclude that the New Mexico tax is a tax on interstate commerce rather than a tax on the "local" activity of generating electricity in New Mexico. *See Fisher's Blend Station Inc., v. Tax Commission*, 297 U.S. 650 (1936).

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[1] For example, the Four Corners Generating Plant located in New Mexico and owned by utilities located in Arizona, California, New Mexico and Texas, generated 11.777 billion kilowatt hours of energy in 1974; or nearly 12% of the 99.359 billion kilowatt hours of energy consumed in the United States in 1932.

II. THE ACT DENIES TO ARIZONA CITIZENS THE PRIVILEGES AND IMMUNITIES GUARANTEED BY ARTICLE IV OF THE UNITED STATES CONSTITUTION AND DENIES EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Taxation schemes that impose special burdens on nonresidents come within an area of special concern to this Court. *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 532-33 (1959) (Separate opinion). Tax classifications by state legislatures which turn upon residence are subject to "a standard of review substantially more rigorous than that applied to state tax discrimination among, say, forms of business organizations or different traeds and professions." *Austin v. New Hampshire*, 420 U.S. 656 (1975). Furthermore, any presumption that exists in favor of the validity of state tax classifications disappears when the state legislature enacting the statute in question has declared its discriminatory purpose, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

As previously shown, the Act establishes a discriminatory classification by means of the credit provision which exempts from taxation all electricity consumed in New Mexico and taxes only electricity consumed outside New Mexico. Moreover, there is no question that the statute was intended to place the tax on nonresidents. (See the letter and attached computations submitted herewith as Appendix "B", from Commissioner of Revenue O'Cheskey to Senator Aubrey Dunn, dated March 10, 1975, advising the sponsor of the Act of precisely how the rate of tax provision and credit provision embodied in the Act should be structured to avoid imposition of any tax burden whatsoever on New Mexico residents.)

The effect of this tax discrimination falls directly upon the citizens of Arizona who consume energy produced in and exported from New Mexico. Arizona utilities, with one minor exception, retail their electrical energy only to consumers in Arizona. For that reason, Arizona utilities incur no liability to New Mexico for its gross receipts tax which is incurred at the point of retail sale. The credit is unavailable to Arizona utilities; the generation tax therefore must be paid and added to the cost of doing business in Arizona.

The tax borne by the Arizona utilities is inevitably passed on to Arizona consumers. Unlike taxes imposed upon unregulated manufacturers and producers of goods and products, a tax imposed on a regulated entity has a predictable incident. Two of the Arizona entities subject to the electrical energy tax are investor-owned public service corporations subject to regulation by the Arizona Corpoartion Commission. As such, under the decisions of this Court, these entities must be permitted to charge rates reasonably calculated to permit them to recover operating expenses (including expenses in the nature of the electrical energy tax) and earn a fair rate of return on behalf of stockholders, a result mandating the eventual pass-through of the electrical generation tax to residents of Arizona. *See Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923). The third entity, Salt River Project, is both an integral part of a federal reclamation project and a political subdivision of the State of Arizona; any costs incurred in producing electrical energy will reflect directly in charges to Arizona residents who use water and power from the Project.

The discriminatory nature of the tax violates the interstate Privileges and Immunities Clause of Article IV of the United States Constitution, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the

several States." In *Austin v. New Hampshire*, 420 U.S. 656 (1975), a case richly suggestive of the situation here confronted, the State of New Hampshire had contrived a "commuter tax" which obstensibly applied both to out-of-state residents working in New Hampshire and New Hampshire residents working outside the State. However, by virtue of a series of exemptions and credits analogous to the tax credit for gross receipts taxes paid in connection with New Mexico retail sales in this case, the overall effect of the statute was a tax payable only by out-of-state residents. In striking down the tax, this Court concluded:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, [citation omitted] judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." 420 U.S. 662-63 (citing *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 80 (1920).

In *Toomer v. Witsell*, 334 U.S. 385 (1948), the Court held invalid South Carolina statutes imposing disproportionate taxes on nonresident shrimp trawlers. The Court confronted a situation suggestive of the retaliatory war that will predictably occur if the electrical energy tariff is allowed to take root, stating:

> Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States. 344 U.S. at 388.

If, in the midst of a national energy crisis, the fifty states are given license to break up and dislocate a national system of electrical distribution through the use of export tariffs, the resulting disaster would dwarf the problems incurred by the shrimping industry prior to the *Toomer* decision.

By parity of reasoning, the New Mexico tax also violates the Equal Protection Clause of the Fourteenth Amendment. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949) (Ohio tax statute discriminating against nonresident corporations held to violate Equal Protection Clause, the Court stating "the federal right of a nonresident 'is the right to equal treatment'."). *Cf. Travellers Insurance Co. v. Connecticut,* 185 U.S. 364 (1902).

The class of Arizona residents designated by the New Mexico Legislature as the ultimate bearer of the New Mexico tax cannot be justified under even the most liberal deference to possible legislative motives or policies. The New Mexico tax, when viewed in light of the industry to which it relates and its statutory history, declares and effects its discrimination purpose as clearly as the statute struck down by this Court in *Wheeling Steel.*

CONCLUSION

For the foregoing reasons, leave should be granted to file the proposed complaint.

Respectfully submitted,

BRUCE E. BABBITT
159 State Capitol
Phoenix, Arizona 85007
Arizona Attorney General

APPENDIX "A"

STATE OF NEW MEXICO
BUREAU OF REVENUE

Santa Fe, New Mexico

87503

March 10, 1975

MEMORANDUM

To: The Honorable Aubrey Dunn
New Mexico State Senator

From: Fred L. O'Cheskey, Commissioner
Bureau of Revenue

Subject: S-258 — Electrical Energy Tax Act

This is in reply to your inquiry in which you requested sample calculations relative to effects of this tax on utilities in New Mexico and ultimately to the consumers.

For example, let's say a utility is generating 200 million net KWH in New Mexico in a given month. The generation tax would be $80,000. Historically, the breakdown of consumption in New Mexico is as follows:

*Commercial and Industrial	66.0%
*Residential	24.0%
Sales — Other Public Auth.	6.8%
*Irrigation	1.5%
Public Street & Highway Ltg.	1.0%
Sales — Inter. Dept.	0.5%
Sales — Military	0.2%
	100.0%

Of this breakdown, the consumption items shown with an asterisk would be that portion subject to the gross receipts tax

and totals 91.5%. Applying this to the 200 million KWH generated less average line loss of 2.5% yields 195 million net KWH for sale. If the utility has the state's average taxable consumption of 91.5% subject to the gross receipts tax and the average price per KWH is 1.8¢ then the total gross receipts would be 178.4 million KWH × 1.8¢ = $3.212 million with $128,466[1] in gross receipts tax ordinarily due. The $80,000 in generation tax can be offset by the utility against the gross receipts tax ordinarily due of $128,466. The utilities customers' billing would remain the same, with the usual "passed on" gross receipts tax of 4%.

If the generating utility sells to other utilities in the state, the generation tax can be assigned along the route with the buyer reimbursing the utility generating the electricity for the generation tax. The ultimate retailer of the electricity can credit the generation tax against the gross receipts tax.

Under the generation tax rate of ½ mill per/KWH, of all the utilities in New Mexico, it appeared that only Southwestern Public Service Company might have to pass some generation tax on to New Mexico consumers. It appears that the amendment to 4/10 of a mill brings down the generation tax so that even in Southwestern's case the gross receipts tax more than offsets the generation tax.

FRED L. O'CHESKEY
Commissioner of Revenue

FLO:sd

[1] This amount of gross receipts tax is much larger in most cases since the tax also applies on the "fuel clause adjustment which varies from 10% to 50% of the basic cost of electricity.

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SEE NO 1